Trujillo v. Apple Computer, Inc. et al Doc. 104

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS

JOSE TRUJILLO, individually and on behalf of all others similarly situated, Plaintiff, vs. APPLE COMPUTER, INC., a California Corporation, and AT&T MOBILITY LLC, a Georgia Corporation, Defendants.	Case No. 1:07-cv-04946 DECLARATION OF DIANE BONINA IN SUPPORT OF AT&T MOBILITY LLC'S MOTION TO COMPEL ARBITRATION AND DISMISS ACTION

I, Diane Bonina, hereby declare as follows:

1. I am employed by AT&T Mobility LLC ("ATTM") as in-house counsel. My responsibilities include being the chief litigation counsel for the West and Central regions. The following facts are of my own personal knowledge, and if called as a witness I could and would testify competently as to their truth.

2. Before being renamed on January 8, 2007, ATTM was called Cingular Wireless LLC ("Cingular"). For the sake of simplicity, I refer to the company as ATTM throughout this declaration.

3. In the paragraphs that follow, I explain that Jose and Dawn Marie Trujillo are ATTM customers who share the same billing address. They had two iPhones on separate accounts: one that Jose Trujillo purchased from an Apple store and that Dawn Marie Trujillo subsequently activated, and one that Dawn Marie Trujillo purchased from an ATTM store and that Jose Trujillo subsequently activated. I also explain why we could not have been aware of these facts at the time that ATTM filed its motion to compel arbitration and Neal S. Berinhout's initial declaration in this case because a search of ATTM's records for a customer named Jose

Dockets.Justia.com

Trujillo would not locate records relating to the account of Dawn Marie Trujillo or her iPhone, which Mr. Trujillo had purchased from an Apple store.

ATTM's Initial Investigation Into Mr. Trujillo's ATTM Account

4. I am the in-house counsel who is responsible for this matter. I report directly to Mr. Berinhout, ATTM's Associate General Counsel—Litigation.

5. Before ATTM filed its motion to compel arbitration in this case, I worked with employees under my direction to investigate Jose Trujillo's account history and ATTM's policies and standard practices regarding the manner in which purchasers of iPhones agree to ATTM's terms of service.

6. Based on Mr. Trujillo's allegation in his complaint that he resided in Melrose Park, Illinois and had activated an iPhone and entered into a two-year service agreement with ATTM, we searched ATTM's records for subscribers fitting that description.

7. That search located account information for a Jose Trujillo whose billing address is 10500 Schubert Avenue, Melrose Park, Illinois 60164. That Jose Trujillo had activated an iPhone using the iTunes program on July 5, 2007. I concluded that this Jose Trujillo was the plaintiff in this case.

8. According to ATTM's records, the iPhone that Mr. Trujillo activated had been purchased from an ATTM retail store in Elmhurst, Illinois.

9. Before Mr. Berinhout filed his October 2007 declaration in support of ATTM's motion to compel arbitration in this case, I reviewed it. Because my understanding was that Mr. Trujillo's iPhone had been purchased from an ATTM store, I concluded that Mr. Berinhout had accurately described the policies and standard practices regarding the availability of ATTM's terms of service to a person who buys an iPhone from an ATTM retail store.

ATTM's Investigation Into Mr. Trujillo's Apple Store Receipt

10. In light of the Court's May 8, 2008 order requesting ATTM to explain the circumstances surrounding Mr. Berinhout's overbroad statement in his October 2007 declaration

that the ATTM terms of service are available in retail stores where iPhones are sold, I, along with employees under my direction, conducted a further investigation. Among other things, we investigated whether Mr. Trujillo's iPhone had been purchased from an ATTM store, given that Mr. Trujillo had included with a court filing a receipt for an iPhone that he had purchased from an Apple retail store in Oak Brook, Illinois on July 2, 2007.

11. That receipt indicates that the Apple serial number for the purchased iPhone is YM724N1AVR0.

12. It is my understanding that the iPhone with Apple serial number YM724N1AVR0 also has the International Mobile Equipment Identity ("IMEI") number 011245000436384.

13. An IMEI number is an identifying number that is assigned to each GSM mobile phone, including each iPhone.

14. According to ATTM's records, a preexisting ATTM customer named Dawn Marie Trujillo activated the iPhone with IMEI number 011245000436384 (the iPhone purchased from the Apple store) on July 3, 2007 by using the iTunes program. Attached as Exhibit 1 is a true and correct copy of a screen shot of a portion of ATTM's account notes for Ms. Trujillo. The third entry from the top of that screen shot indicates that the device with IMEI number 011245000436384 was associated with Ms. Trujillo's wireless line (708) 259-1194. And the top entry on that screen shot indicates that Ms. Trujillo used Apple's iTunes software to renew her service agreement on that line by agreeing to a 24-month commitment term.

15. A search of ATTM's records for customers named Jose Trujillo would not locate information about Dawn Marie Trujillo's ATTM account or the iPhone that she activated on that account on July 3, 2007. According to ATTM's records, Jose Trujillo's account and Dawn Marie Trujillo's accounts are separate. Nothing in the account notes for Mr. Trujillo's account refers to Dawn Marie Trujillo's account. A true and correct copy of Mr. Trujillo's account notes is attached as Exhibit 2.

Dawn Marie Trujillo's ATTM Account

16. Dawn Marie Trujillo first obtained wireless service from ATTM in November 2005. According to ATTM's records, Ms. Trujillo's service for two wireless phone lines was activated on November 8, 2005. A true and correct copy of a printout of a portion of Ms. Trujillo's account notes is attached as Exhibit 3. The fourth and sixth entries on that document indicate that service was activated on lines (708) 259-1194 and (708) 426-8061 by using the POSII system. The POSII system is used by employees of ATTM retail stores.

17. When Ms. Trujillo's service was activated in November 2005, she would have been provided with a copy of the then-current Terms of Service booklet. A true and correct copy of the booklet that Ms. Trujillo would have received is attached as Exhibit 4.

18. According to ATTM's records, Ms. Trujillo's billing address for her account was always 10500 Schubert Avenue, Melrose Park, Illinois 60164. That is the same address listed on Jose Trujillo's account.

19. According to ATTM's records, on April 17, 2006, a person identifying himself as Jose Trujillo called customer service to ask about an error message displayed on a cell phone that recently had been shipped to Dawn Marie Trujillo to replace an earlier phone that she had lost. A true and correct copy of a printout of a portion of Ms. Trujillo's account notes is attached as Exhibit 5. The second entry from the top of that printout describes that phone call.

20. ATTM revised the arbitration provision in its subscriber agreements in late 2006.

21. ATTM sent a copy of the 2006 provision to all current subscribers who received monthly paper bills in the envelopes containing their December 2006 bills. Pursuant to the "change in terms" provisions in its customers' WSAs, that revised arbitration provision took effect upon receipt. In addition, as of March 2007, new ATTM Wireless Service Agreements contain the 2006 arbitration provision. A true and correct copy of the Notice of Improved Arbitration Clause mailed to all of ATTM's current subscribers in December 2006, including Ms. Trujillo, is attached as Exhibit 6.

22. ATTM also included a legend on its subscribers' December 2006 and January through March 2007 bills to remind them that the arbitration provision in their contracts had been changed and to invite them to view information about arbitration on ATTM's website (at http://www.cingular.com/disputeresolution or, later, http://www.att.com/disputeresolution). True and correct copies of the first pages of Ms. Trujillo's December 2006 and January 2007 bills, the second-to-last page of her February 2007 bill, and the last page of her March 2007 bill are attached as Exhibit 7.

23. According to ATTM's records, on June 2, 2007, Ms. Trujillo called ATTM's customer service department to inquire about the release date of the iPhone.

24. According to ATTM's records, on June 30, 2007, Ms. Trujillo called ATTM's customer service department to ask about purchasing an iPhone and was told that iPhones could be purchased only from ATTM or Apple retail stores.

25. As noted above, Ms. Trujillo activated an iPhone on July 3, 2007, using her existing line of service with the phone number (708) 259-1194. Preexisting ATTM customers who activate iPhones using the iTunes software must indicate that they agree to ATTM's terms of service in the manner that Mr. Berinhout described in his October 2007 declaration in this case.

26. According to ATTM's records, Ms. Trujillo cancelled this line of service on December 15, 2007. Ms. Trujillo was assessed and later paid an $175 early-termination fee. Ms. Trujillo had previously cancelled service on phone line (708) 426-8061 as of May 8, 2007 and was not assessed an early-termination fee.

Jose Trujillo's ATTM Account

27. As noted above, Jose Trujillo activated an iPhone for use with ATTM's wireless service on July 5, 2007. ATTM's records reflect that, on June 29, 2007, Dawn Marie Trujillo went to an ATTM store in Elmhurst, Illinois, and ordered the iPhone that Jose Trujillo activated on July 5. In a separate declaration, Ramoncito Balce, a manager at the Elmhurst ATTM store, provides further details relating to the purchase and activation of Mr. Trujillo's iPhone.

28. According to ATTM's records, on December 15, 2007, Mr. Trujillo cancelled his service with ATTM in order to port his wireless number to another carrier. Mr. Trujillo was assessed and later paid an $175 early-termination fee.

I declare under penalty of perjury that the foregoing is true and correct. Executed on May 19, 2008.

Diane Bonina